Dr. N. Arumugasamy, the Neurosurgeon who examined the boy gave a report dated Janury 20, 1978 in which he found that the neurological examination including an EEG were that of a normal boy of the Plaintiff's age. He went on to state that it was well within the range of possibility that the boy's performance might be impaired somewhat as a result of the "head injury of the type that this patient underwent." No reference was made as to what head injury the boy suffered. To my mind, the Neurosurgeon could not have been talking of the lacerations due to glass splinters. Without a history of concussion I found it difficult to relate Dr. Arumugasamy's report to the injuries sustained by the Plaintiff in the accident of December 25, 1974.

Counsel for the Plaintiff tried to make something of the boy's showing in school. However, I have not seen any significant deterioration of the boy's performance after the accident. His examination results prior to the accident were not significantly better than his results after the accident.

Encik Mahindar Singh had argued that in assessing damages I should treat pain and suffering separately from the loss of amenities. To do so would be to deviate from the approach made by our courts in assessing damages for personal injury. No reason was put forward to support the suggestion and I see no reason to deviate from the accepted practice.

For the pain and suffering and loss of amenities arising from the fractures of both femurs and the right tibia and fibula and the severance of the muscle that caused the moderate foot drop and having in mind *inter alia* the other minor injuries and that this young boy was in hospital from Christmas day 1974 to May 4, 1975 I would award at 100% $30,000/-.

The Plaintiff was only 11 years old when this accident happened. I was asked to make an award for loss of earning capacity. The background of the Plaintiff and the nature of the permanent disabilities suffered by him makes any suggestion that it would have some effect on his earning capacity rather remote in that it is too speculative and even fanciful. I make no award under that head.

There had been agreement on special damages at 100% in the sum of $502/-.

I gave judgment for the Plaintiff as follows: Specials: $251 together with interest thereon at 4% per annum from date of accident until judgment and thereafter at 8% per annum. General damages: $15,000/- together with interest thereon at 8% per annum from date of service of writ until realisation.

The Defendant will also pay the costs of the Plaintiff as taxed at High Court scale.

Order accordingly.

Solicitors: *Mahindar & Co.; Dzaiddin & Co.*

POI KUEN MUN (f) & ORS. v. NG WEI CHOO

[O.C.J. (Mohamed Azmi F.J.) January 7, 1983]
[Seremban – Civil Suit No. 61 of 1981]

Damages – Fatal accident – Quantum agreed at $114.500 on 100% liability – Issue as to liability – Defendant's selfish attitude in hugging to centre of the road despite fact that collision clearly and reasonably forseeable – Defendant 1/3 liable for accident – Civil Law Act 1956, ss. 7 & 8

Road Traffic – Defendant's selfish attitude in hugging to centre of road – Defendant 1/3 liable for accident.

The plaintiffs (wife and parents of the deceased) were suing as dependants of the deceased. The 1st and 2nd plaintiffs were also suing in their capacity as the administratrix and administrator of the deceased's estate. They claimed for damages arising out of a fatal accident in July 1979 under sections 7 and 8 of the Civil Law Act 1956.

On that fateful day the deceased was driving his Mazda car from Labis to Segamat and the 1st defendant was driving in the opposite direction. At or near 98½ milestone Johore Bahru – Segamat road a collision occurred between the 2 vehicles on an undulating but straight stretch of road resulting in the death of the deceased.

Though it was drizzling, visibility was good at the material time. At the time of collision the Mercedes Benz was proceeding downhill and the deceased's Mazda was then trying with difficulty to overtake another car from the opposite direction due to the other car's refusal to give way. Faced with the dangerous situation the deceased frantically tried to swerve back to his left but he was unsuccessful in his attempt and thereby collided with the Mercedes Benz driven by the defendant.

General damages at $114,500 and special damages at $2,414 based on 100% liability were agreed by the parties. The only dispute was as to liability.

Held: on the issue of liability the deceased was 2/3rd to blame and the 1st defendant 1/3rd in contributory negligence. The 1st defendant was guilty of contributory negligence as the collision had been clearly and reasonably forseeable. In such a situation where the 1st defendant knew that he could have avoided the collision by swerving

slightly to his left, he owed a duty to avoid the collision, and it was not sufficient to continue without doing anything himself when there was in fact opportunity for him to defuse the danger. The 1st defendant was selfish in his attitude in hugging the centre of the road although he well knew the deceased was in a precarious and dangerous situation at the material time;

(2) the apportionment of liability for contributory negligence was therefore fair and equitable.

CIVIL SUIT.

K.Y. Chew for the plaintiffs.
Santhana Dass for the defendants.

Cur. Adv. Vult.

Mohamed Azmi F.J.: This is a claim for damages arising out of a fatal motor accident in July, 1979 under sections 7 and 8 of the Civil Law Act, 1956. The plaintiffs are suing as dependants of Foong Veem Ching (deceased) and the 1st and 2nd plaintiffs are also suing in their capacity as the administratrix and administrator of the deceased's Estate.

It is not in dispute that on July 21, 1979 the deceased was driving Mazda motor car No. NM 7490 from Labis to Segamat i.e. from the direction of Johore Bahru towards Kuala Lumpur and the 1st defendant was driving Mercedes Benz motor car BAX 7 proceeding from the opposite direction. At or near 98½ milestone Johore Bahru-Segamat road a collision occurred between the two vehicles on an undulating but straight stretch of road resulting in the death of the deceased. From the evidence, it is also not challenged that although it was drizzling visibility was good at the material time.

The only issue in this case is on liability since damages have been agreed at $114,500/- as general damages and $2,414/- as special damages based on 100% liability. On the issue of liability it is the plaintiffs' case that the collision occurred as a result of the 1st defendant negligently encroaching on to the deceased's path and right of way and as such the 1st defendant as the driver of the Mercedes Benz and the 2nd defendant as the registered owner are solely to blame for the collision. The Defence on the other hand avers that it was in fact the deceased's Mazda which encroached on to the Mercedes Benz's side of the road whilst attempting to overtake another vehicle in the face of oncoming traffic and as such the collision was caused wholly or substantially by the negligence of the deceased himself.

After considering all the evidence in this case and the submission of both counsel on the issue of liability I find the deceased 2/3rd to blame and the 1st defendant 1/3rd in contributory negligence, and I accordingly give judgment for the plaintiffs on 1/3rd of the agreed quantum on special and general damages. The defendants have now appealed against my decision on liability.

As to how the collision occurred I accept the evidence of the 1st defendant (driver of Mercedes Benz) and his passenger Ng Chin Keong (DW2) that it was the deceased's Mazda which encroached on to the Mercedes Benz side of the road and not the other way round. On the plaintiffs' version of the accident I have to rely on the silent evidence namely the sketch plan (Exhibit AB 6), the photographs (Exhibits AB 2 and AB 3) and the evidence of the investigating officer Sgt. Shahdan bin Abu, now retired (PW1). According to Ex Sgt. Shahdan when he arrived at the scene the road was wet and he only found two fresh marks on the road – (1) a scratch line in the middle of the road where the road surface was slightly peeled off, at "F" in the sketch plan, and (2) the offside tyre mark of Mercedes Benz about 70 feet in length on the side table marked 'Q' to 'R'. It is the opinion of Ex Sgt. Shahdan that the point of impact was at point "F" on the flimsy ground that it was the only mark he could find on the road. Since he cannot explain why the beginning of the tyre mark 'Q' on the side table commenced before "F" as one faced towards Johore Bahru, it is my finding that point "F" could not be the point of impact. In this connection, I accept the evidence of 1st defendant in re-examination that his Mercedes Benz went on the grass verge only after impact. As such it is reasonable to infer that coming from Segamat the point of impact must be somewhere before and not after point "Q".

In assessing 1/3rd as 1st defendant's liability in contributory negligence I take into account his failure to avoid the accident which he could and should have done under the circumstances. On his own testimony and as well as the testimony of DW2 I accept the fact that at the time of collision the Mercedes Benz was proceeding downhill and that the deceased's Mazda was then trying with difficulty to overtake another car from the opposite direction due to the other car's refusal to give way. He saw this dangerous situation developing from a distance of about 60 feet. All he did was to sound his horn and reduce his speed from 80 to 60 km. p.h. Although his half of the

road was 10½ feet wide (the whole width of the road being 21 feet) he continued to travel 1 to 2 feet of the centre white line until the collision. Thus at page 8 paragraph D of the Notes of Evidence the 1st defendant under cross-examination described his conduct in facing the dangerous situation in the following words:-

"Just before collision, my car was being driven about 1 to 2 feet from the white line. When the whole of Mazda car was on my side of the road, it was about 40 feet from me.

I did not swerve to the left before impact because the road was wet.

Q. Put to you, you were encroaching onto Mazda's half of the road. If your version was correct there would be head-on collison?

A. Yes, but Mazda swerved to its left and the front car sped on."

Later at page 9 paragraph C 1st defendant went on to say:—

"I agree the main impact was on driver's door for Mazda and my car grazed along the rear part of Mazda. I agree if I had swerved slightly to the left, nothing would have happened."

From 1st defendant's own evidence and admission, it is my finding that he is guilty of contributory negligence even if his version of the collision were wholly accepted as the truth. Indeed in the main, I accept the defence version of the collision in that the deceased was at the material time trying to overtake another car on the face of oncoming vehicle. The deceased was principally to blame for the collison. The attempt at overtaking was a reckless conduct not only because of oncoming traffic but also because of the double white line (one continuous and one broken) which prohibited him from overtaking – the continuous white line being on his side. From Defence evidence it can reasonably be inferred that as the Mercedes Benz appeared from the opposite direction, the deceased who was then in the act of overtaking was put in a precarious position when the leading car refused to allow him to do so. Faced with the dangerous situation the deceased frantically tried to swerve back to his left but he was unsuccessful in his attempt and thereby collided with the Mercedes Benz. Be that as it may, I cannot accept Defence version of the collision that the whole of the Mazda car was on the wrong side of the road just before the impact. Since the collision was not head-on and having regard to the damage caused to both vehicles, at the most the Mazda car must have encroached onto the 1st defendant's side of the road only for 1 or 2 feet. This is consistent with 1st defendant's evidence that at all material times until the collision he was driving 1 or 2 feet from the centre white line. From the evidence of Ex Sgt. Shahdan almost all the damage to both vehicles were on the offside, and the offside front mudguard of both cars were dented which clearly indicate that the collision was not a head-on collision but more consistent with both vehicles grazing each other causing them to be thrown to their respective left side of the road as shown in the sketch plan.

The contention of the Defence is that the deceased was wholly to be blamed for the collision. From the evidence of the 1st defendant it seems to be suggested that since the Mercedes Benz was travelling on its correct side of the road when the deceased was trying to overtake from the opposite direction he was entitled in law to say –

"The Mazda car driver created his own dangerous situation by overtaking at a point where it should not have been done and it was for him to solve his own problem by doing whatever was possible to get out of his dilemma. As fas as I was concerned, I owed no duty to any one and I was entitled to proceed 1 or 2 feet from the centre of the road so long as I was on my correct side notwithstanding that the deceased was clearly in a precarious position in that he could not possibly succeed either on the overtaking or in pulling back to the rear of the leading car. Apart from sounding my horn and reducing my speed, I would remain in the centre of the road despite the fact that I could have swerved slightly to the left to allow the deceased sufficient room to pass, or sufficient time to pull back to the rear of the front vehicle."

In my judgment with such attitude, the 1st defendant is guilty of contributory negligence when the collision had been clearly and reasonably foreseeable. The law of the road is based on the principles of "give and take" and "live and let live". In such a situation where the 1st defendant knew that he could have avoided the collision by swerving slightly to his left, he owed a duty to avoid the collision, and it is not sufficient in law for him merely to remain neutral and punish the deceased by allowing the dangerous situation to continue without doing anything himself when there was in fact opportunity for him to defuse the danger. The fact that the road was wet is insufficient reason or excuse for not giving sufficient room for the deceased to pass with safety. By his total failure to swerve to the left I find that the 1st defendant is guilty of contributory negligence to the extent of 1/3rd. In making that apportionment I take into consideration his selfish attitude in hugging the centre of the road although he well

knew the deceased was in a precarious and dangerous position at the material time. All he need do to avoid the collision was to swerve slightly to his left but instead he elected to proceed on 1 or 2 feet from the centre white line as if to teach the deceased a lesson for overtaking at the wrong place and time.

I am therefore of the view that the apportionment of liability for contributory negligence is fair and equitable in the circumstances.

Order accordingly.

Solicitors: *Chew & Co.; Sng & Matthew*

PUBLIC PROSECUTOR v. PUTEH NORDIN & ANOR.

[O. Cr. J. (Ajaib Singh J.) March 22, 1983]
[Ipoh – Perak Criminal Trial No. 2 of 1983]

Dangerous Drugs – Trafficking – "Cannabis" – Definition of Cannabis as dangerous drug – "any plant of the genus cannabis or any part thereof ... together with its stalk, its fibre and seed" – Chemist was right in weighing cannabis plants with stalk, fibre and seed – Dangerous Drugs 1952, s. 39B(1)(a).

Criminal Law & Procedure – Trafficking in cannabis – Accused persons jointly charged – 1st accused convicted and sentenced but 2nd accused acquitted and discharged.

In this case, 2 accused were jointly charged with trafficking in a dangerous drug under s. 39B(1)(a) of the Dangerous Drugs Act 1952. At the end of the prosecution case the trial court acquitted and discharged the 2nd accused as there was insufficient evidence to call for his defence. The first accused was called upon to make his defence.

The chemist examined the contents of the bundle and found it to contain 2.87 kg. cannabis. Defence counsel submitted that the weight of the cannabis must be less than 2.87 kg. because the chemist had weighed the contents of the bundle before separating the stalk, fibre and seed.

Held: (1) any plant of the genus cannabis or any part thereof comes within the definition of cannabis as a dangerous drug together with its stalk, its fibre and seed. The chemist was therefore right in weighing the plants she found in the bundle without removing the stalk, fibre and seed;

(2) the 1st accused made no attempt to rebut the presumption against him under s. 37 (da) of the Dangerous Drugs Act and he was therefore found guilty and convicted on the charge;

(3) the Court took into consideration the following mitigating factors: the accused was a first offender, had a wife and 5 children to support and that the drug found in his possession was less deleterious than morphine and heroin. He was therefore not sentenced to death but to the lesser punishment of life imprisonment plus 6 strokes of the rotan.

Editorial Note: The first accused's appeal against conviction and the Public Prosecutor's cross-appeal against sentence of life imprisonment came up for disposal before the Federal Court in Kuala Lumpur on August 15, 1983 (Federal Court Civil Appeal Nos. 13 & 15 of 1983). Both the appeal and the cross-appeal were dismissed. The Federal Court which was in complete agreement with Ajaib Singh J.'s interpretation of the new definition of "Cannabis" under section 2 of the Dangerous Drugs Act 1952 (as amended by Act A491 which came into force on May 30, 1980) gave no written judgment.

CRIMINAL TRIAL.

Tee Hong Geok (Miss) (Deputy Public Prosecutor) for the prosecution.

Bakarudin bin Sulaiman for the 1st accused.

S. Theivanthiran and *J.S. Olikh* for the 2nd accused.

Cur. Adv. Vult.

Ajaib Singh J.: The two accused in this case were jointly charged with trafficking in a dangerous drug under section 39B(1)(a) of the Dangerous Drugs Act 1952. At the end of the prosecution case I acquitted and discharged the 2nd accused as I held that there was insufficient evidence to call for his defence. The 1st accused was called upon to make his defence and after the conclusion of the trial I found him guilty and sentenced him to life imprisonment plus six strokes of the rotan.

The evidence against the 1st accused was overwhelming for he was caught red-handed. The police had set up a trap and DPC Sivanesan met the 1st accused at a pre-arranged place on the roadside to buy ganja from the 1st accused. A short while later they were joined by the 2nd accused who turned up at the place on a motor cycle which had a large basket on its carrier. The 1st accused then walked over to a hut nearby and came back wheeling a bicycle and on the carrier of the bicycle was a bundle covered with a gunny sack. The 1st accused removed the bundle and placed it in the basket which was on the motor cycle. At the request of DPC Sivanesan the 2nd accused opened the bundle and DPC Sivanesan found it to contain ganja. DPC Sivanesan then gave a pre-arranged signal whereupon a police party which was keeping observation rushed up and arrested both the accused. The bundle was sent to the chemist who certified that it contained 2.87 kilograms of cannabis.